IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jose Angel Valdez, Petitioner, vs. Charles L. Ryan, et al., Respondents.	No. CV-11-681-TUC-FRZ-DTF **REPORT AND RECOMMENDATION**

Petitioner Jose Angel Valdez has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. In accordance with the Rules of Practice of the Court, this matter was referred to Magistrate Judge Ferraro for Report and Recommendation. Before this Court are the Petition (Doc. 1) and Respondents' Answer (Doc. 13). Petitioner did not file a reply. The Magistrate Judge recommends that the District Court, after its independent review of the record, dismiss the petition.

FACTUAL AND PROCEDURAL BACKGROUND

The grand jury indicted Petitioner for sexual conduct with a minor under 15 and two counts of molestation of a child under 15. (Doc. 13, Ex. A, Doc. 2.) Subsequently, the State filed an Allegation of Dangerous Crimes Against Children alleging that Count 1, sexual conduct with a minor, involved a child 12 years of age or younger. (*Id.*, Doc. 29.) Petitioner was convicted on all 3 charges. (*Id.*, Doc. 92 .) The jury found, as to Count 1, that the victim was under 12. (*Id.*) Petitioner was sentenced to a mandatory 35 years to life for the sexual conduct charge (dangerous nature) and to ten-year terms for the molestation charges, concurrent with each other but consecutive to the 35-year term. (Doc. 13, Ex. A, Doc. 111.)

Petitioner challenged only his sentence on appeal and the Arizona Court of Appeals affirmed. (Doc. 13, Ex. M.) The Arizona Supreme Court denied review. (*Id.*, Ex. O.)

Petitioner filed a Notice of Post-conviction Relief (PCR). (Doc. 13, Ex. P.) The court appointed Petitioner's appellate attorney to represent him for the PCR proceeding. (*Id.*, Ex. Q.) Counsel filed notice that he could not find any colorable PCR claims. (*Id.*, Ex. R.) Petitioner was granted the right to, and did, file a pro se PCR petition. (*Id.*, Ex. X.) The Court dismissed the petition, denying the ineffective assistance of counsel (IAC) claims on their merits and finding the remaining claims precluded. (*Id.*, Ex. Z.) The Arizona Court of Appeals granted Petitioner's petition for review but denied relief. (Doc. 13, Exs. BB, CC.)

DISCUSSION

Petitioner raises four multi-part claims. Respondents concede that the petition is timely (Doc. 13 at 17), however, they contend that Claims 1, 3 and 4 are procedurally defaulted. The Court first evaluates these claims for exhaustion and then evaluates the properly exhausted claims on the merits.

PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT

A writ of habeas corpus may not be granted unless it appears that a petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991). To exhaust state remedies, a petitioner must "fairly present" the operative facts and the federal legal theory of his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). Exhaustion requires that a petitioner clearly alert the state court that he is alleging a specific federal constitutional violation. *See Casey v. Moore*, 386 F.3d 896, 913 (9th Cir. 2004); *see also Gray v. Netherland*, 518 U.S. 152, 163 (1996) (general appeal to due process not sufficient to present substance of federal claim); *Lyons v. Crawford*, 232 F.3d 666, 669-70 (2000), *as amended by* 247 F.3d 904 (9th Cir. 2001) (general reference to insufficiency of evidence, right to be tried by impartial jury, and ineffective assistance of counsel lacked

specificity and explicitness required); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) ("The mere similarity between a claim of state and federal error is insufficient to establish exhaustion.").

In Arizona, there are two primary procedurally appropriate avenues for petitioners to exhaust federal constitutional claims: direct appeal and PCR proceedings. Rule 32 of the Arizona Rules of Criminal Procedure governs PCR proceedings and provides that a petitioner is precluded from relief on any claim that could have been raised on appeal or in a prior PCR petition. Ariz. R. Crim. P. 32.2(a)(3). The preclusive effect of Rule 32.2(a) may be avoided only if a claim falls within certain exceptions (subsections (d) through (h) of Rule 32.1) and the petitioner can justify why the claim was omitted from a prior petition or not presented in a timely manner. *See* Ariz. R. Crim. P. 32.1(d)-(h), 32.2(b), 32.4(a).

A habeas petitioner's claims may be precluded from federal review in two ways. First, a claim may be procedurally defaulted in federal court if it was actually raised in state court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at 729-30. Second, a claim may be procedurally defaulted if the petitioner failed to present it in state court and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman*, 501 U.S. at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998) (stating that the district court must consider whether the claim could be pursued by any presently available state remedy). If no remedies are currently available pursuant to Rule 32, the claim is "technically" exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732, 735 n.1; *see also Gray*, 518 U.S. at 161-62.

Because the doctrine of procedural default is based on comity, not jurisdiction, federal courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*, 468 U.S. 1, 9 (1984). However, the Court will not review the merits of a procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the failure to properly exhaust the claim in state court and prejudice from the alleged constitutional violation, or

shows that a fundamental miscarriage of justice would result if the claim were not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.

PROCEDURAL DEFAULT ANALYSIS

Claim 1

Petitioner alleges that (a) his Sixth Amendment rights were violated by the State failing to give notice that he was charged with sexual conduct with a minor under the age of 12, because the indictment charged him with sexual conduct with a minor under the age of 15; (b) (i) trial and (ii) appellate counsel provided ineffective assistance based on their failure to research and raise issue 1(a); and (c) (i) his Sixth Amendment right to compel witnesses was violated when his son was denied the right to testify, and (ii) trial counsel was ineffective in allowing this to happen.[1]

Petitioner did not raise these claims on direct appeal or in his PCR petition. (Doc. 13, Exs. H, X.) He acknowledged this fact in his petition to this Court. (Doc. 1 at 6.) Therefore, he failed to fairly present these claims in state court. If Petitioner were to return to state court now to litigate Claims 1(a), 1(b)(i), and 1(c) they would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because they do not fall within an exception to preclusion. Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). These claims are technically exhausted but procedurally defaulted.

Claim 1(b)(ii) alleging ineffectiveness of appellate counsel possibly could still be raised in state court. Petitioner was represented by the same counsel on appeal and in his first PCR proceeding and it would have been improper for that counsel to allege his own ineffectiveness. *State v. Bennett*, 146 P.3d 63, 67, 213 Ariz. 562, 566 (2006). Therefore, it is not clear that this claim would be precluded if raised in a subsequent PCR petition. *Id.* Because this claim is without merit, the Court addresses and dismisses it below. *See* 28 U.S.C. § 2254(b)(2).

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[1] Respondents summarize Claim 1(c) differently than the Court, and they did not include in their summary the IAC portion of the claim, labeled by the Court as Claim 1(c)(ii).

Claim 3

Petitioner alleges that his Fifth Amendment rights were violated because (a) he was made to stand trial for, and convicted of, a charge not contained in the indictment, and (b) the State broadened the dates of the offenses in the indictment by amendment. He also alleges (c) that the State violated the Fifth Amendment prohibition against double jeopardy by charging him in Counts 1 and 2 for the same conduct because Count 2 was a lesser-included offense of Count 1.[2]

Petitioner represents that he raised this claim to the Arizona Court of Appeals but then indicates it was not presented in entirety. (Doc. 1 at 14.) Review of his opening appellate brief and PCR petition reveals that he did not fairly present any portion of this claim in state court. (Doc. 13, Exs. H, X.) If Petitioner were to return to state court now to litigate this claim, it would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). This claim is technically exhausted but procedurally defaulted.

Claim 4

Petitioner alleges that he did not receive a fair trial in violation of his Fourteenth Amendment right to due process, based on the grounds alleged in Claims 1 through 3. Petitioner did not fairly present this catch-all claim in state court either on appeal or in a PCR proceeding (Doc. 13, Exs. H, X), a fact which he acknowledges in his petition (Doc. 1 at 17).

If Petitioner were to return to state court now to litigate this claim, it would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). This claim is technically exhausted but procedurally defaulted.

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[2] The Court and the Respondents' summary of the subparts of Claim 3 are slightly different.

Cause and Prejudice

Claims 1(a), 1(b)(i) and (ii), 3 and 4 are procedurally defaulted and subject to dismissal absent a ground to overcome the default. In the petition, Petitioner asserts that his failure to properly raise Claims 1, 3 and 4 was due to the ineffective assistance of counsel. He further alleges that if these claims had been properly raised the result of the proceedings would have been different. He did not file a reply brief, responding to Respondents' procedural default arguments; however, the Court addresses cause and prejudice to the extent raised in the petition.

Claims 1(a), 1(c)(i), 3 and 4 are record-based claims that should have been raised, if at all, on direct appeal. Therefore, to the extent these claims were viable, it is appellate counsel that should have raised them in state court. Ineffective assistance of appellate counsel that violates the Sixth Amendment can serve as cause for a petitioner's failure to properly exhaust claims in state court. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). However, before ineffectiveness of appellate counsel may be used to establish cause for a procedural default, it must be presented to the state court as an independent claim. *Id.* at 489. Petitioner did not allege in his PCR petition that his appellate counsel was ineffective for failing to raise any claims. (Doc. 13, Ex. X.) However, because he was represented by the same counsel on appeal and in his first PCR proceeding, it would have been improper for that counsel to allege his own ineffectiveness. *See Bennett*, 146 P.3d at 67, 213 Ariz. at 566. Therefore, it is not clear that this claim would be precluded if raised in a subsequent PCR petition. *Id.* Because this could operate as cause if exhausted, the Court will assess the merits of Claims 1(a), 1(c)(i), 3 and 4 to determine if Petitioner was prejudiced by counsel's failure to raise them on appeal.

Claims 1(b)(i) and 1(c)(ii), alleging ineffective assistance of trial counsel should have been raised, if at all, in Petitioner's PCR proceeding. There is no constitutional right to PCR counsel, thus, the Sixth Amendment is not implicated when counsel is ineffective in such a proceeding. However, because a PCR proceeding is the first time in Arizona that IAC at trial may be raised, the Supreme Court holds that if PCR counsel is ineffective pursuant to the

standards of *Strickland v. Washington*, 466 U.S. 668 (1984), in failing to raise a trial IAC claim, that may constitute cause to excuse a default of that claim. *Martinez v. Ryan*, 132 S.Ct. 1309, 1315 (2012). Subsequent to the State filing its brief in this case, the Ninth Circuit concluded that an allegation that PCR counsel was ineffective, as cause to excuse the default of an IAC at trial claim, does not have to be exhausted. *Dickens v. Ryan*, 688 F.3d 1054, 1072 (9th Cir. 2012). Thus, PCR counsel's failure to raise Claims 1(b)(i) and 1(c)(ii) could operate as cause to excuse the defaults. Therefore, the Court will assess the merits of Claims 1(b)(i) and 1(c)(ii) to determine if Petitioner was prejudiced by counsel not raising them.

Claims 1(a) and 1(b)(i)

Petitioner alleges that (a) his Sixth Amendment rights were violated by the State failing to give notice that he was charged with sexual conduct with a minor 12 or under, and (b) (i) trial counsel provided ineffective assistance based on his failure to research and raise issue 1(a). More specifically, Petitioner alleges that he was charged in the indictment with sexual conduct with a minor under 15 (not a minor 12 or under) but convicted and sentenced based on sexual conduct with a minor 12 or under. A charge of sexual conduct with a minor 12 years of age or younger carries a mandatory sentence of 35 years to life, while sexual conduct with a minor under the age of 15 (but not 12 or under) carries a presumptive sentence of 20 years. A.R.S. § 13-705.

The Court looks first at Claim 1(a). Petitioner's allegations are without merit because he had notice of the State's intent to prove to the jury that he engaged in sexual conduct with a child 12 or under. On September 2, 2005, the grand jury returned an indictment charging Petitioner, in Count 1, with sexual conduct with a minor under 15, a class two felony, a dangerous crime against children. (Doc. 13, Ex. A, Doc. 2.) The indictment cites, among other statutes, A.R.S. § 13-604.01 (which is now found at A.R.S. § 13-705). On January 3, 2006, the State filed an Allegation of Dangerous Crimes Against Children, citing A.R.S. § 13-604.01(A) and alleging that Count 1 was a dangerous crime against a child 12 years of age or younger. (Doc. 13, Ex. A, Doc. 29.) Petitioner was tried on the three counts in the amended indictment, and a mistrial was declared on April 3, 2006, when the jury could not

reach a verdict on any counts. (*Id.*, Doc. 61.) The verdict forms presented to that jury asked the jury to decide, if it found Petitioner guilty on Count 1, whether the victim was under the age of 12. (*Id.*, Doc. 50.) When Petitioner was re-tried in August 2006, and found guilty on all three charges, the verdict form asked the same question as to Count 1, whether the victim was under the age of 12. (*Id.*, Doc. 92.) These documents make clear that Petitioner and his counsel had notice long before his second trial commenced in August 2006, that the State intended to prove that the victim was 12 years of age or younger. Petitioner's claim fails because the record demonstrates that he had notice the State would be trying to prove, as to Count 1, that the victim was 12 or younger.[3] Because the factual premise of Claim 1(a) fails, Petitioner was not prejudiced by counsel's failure to raise this claim on appeal.

Claim1(b)(i) fails because trial counsel was not ineffective for failing to raise Claim 1(a), which is without merit. To establish ineffective assistance of counsel, a defendant first must demonstrate that counsel's performance was deficient, *i.e.*, that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed a defendant by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Second, a defendant must show that the mistakes made were "prejudicial to the defense," that is, the mistakes created a "reasonable probability that, but for [the] unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A court need not address both prongs of an ineffectiveness claim, if it is easier to dispose of it solely by assessing prejudice, the court is free to do so. *Id.* at 697. Petitioner's IAC claim fails because there is not a reasonable probability that Claim 1(a) would have succeeded if trial counsel had raised it because Petitioner had notice of the charges on which he was tried.

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[3] To the extent Petitioner argues that providing notice other than by way of grand jury indictment violated his constitutional rights, his claim fails on legal grounds. The Fifth Amendment requirement of indictment by a grand jury has not been incorporated against the states. *See Hurtado v. People of State of Cal.*, 110 U.S. 516, 538 (1884); *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972).

In light of this analysis, Petitioner has not demonstrated actual prejudice arising from the procedural default of Claims 1(a) and 1(b)(i). Therefore, they are procedurally defaulted and subject to dismissal on that ground. Alternatively, regardless of exhaustion they are meritless and may be dismissed on that basis. *See* 28 U.S.C. § 2254(b)(2).

Claims 1(c)(i) and (ii)

In Claim 1(c) Petitioner alleges that (i) his Sixth Amendment right to compel witnesses was violated when his son was denied the right to testify, and (ii) trial counsel was ineffective in allowing this to happen.

The record contains a motion from the prosecutor to preclude Petitioner's son from testifying at the first trial. (Doc. 13, Ex. A, Doc. 49.) The court granted the motion on the morning of the fourth day of trial; however, later that day the court reversed its decision and ruled that the defense could call him to testify or show the videotape of his statement. (*Id.*, Doc. 48 at 1-2.) The minute entry further reflects that the videotape was shown to the jury. (*Id.* at 3.) At Petitioner's second trial, his son was called as a witness and testified. (Doc. 13, Ex. E at 74-77.) Petitioner does not allege anything specific as to which his son was precluded from testifying and there is nothing in the record indicating his testimony was limited.

Because Petitioner's son testified at trial and he has not asserted that counsel failed to elicit specific testimony, there is no factual basis for these claims. Thus, Petitioner has not demonstrated actual prejudice arising from the default of Claims 1(c)(i) and (ii). Therefore, they are procedurally defaulted and subject to dismissal on that ground. Alternatively, regardless of exhaustion they are meritless and may be dismissed on that basis. *See* 28 U.S.C. § 2254(b)(2).

Claim 3

Petitioner first argues, in Claims 3(a) and (b), that his right to due process was violated because he was convicted of a charge, and offenses occurring on certain dates, that was not contained in the indictment presented to the grand jury. These claims fail on legal grounds because the Fifth Amendment requirement of indictment by a grand jury has not been

incorporated against the states. *See Hurtado v. People of State of Cal.*, 110 U.S. 516, 538 (1884); *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972).

Next, Petitioner alleges in Claim 3(c) that the State violated the Fifth Amendment prohibition on double jeopardy by charging him in Count 2 with a lesser-included offense of Count 1. In Count 1, Petitioner was charged with sexual conduct with a minor, which was based on Valdez performing oral sex on the victim. Valdez argues that he necessarily touched the victim's genitals while committing Count 1, and that touching was the factual basis for the molestation charge of Count 2. This claim fails because it is factually erroneous.

Petitioner is correct that Count 1 was based on him performing oral sex on the minor victim. The victim testified that this occurred after they watched a movie and Valdez was driving the victim home. (Doc. 13, Ex. C at 109-16.) The victim testified that Petitioner stopped in a dark location and had the victim stand on the bumper of his van with his pants down. (*Id.* at 111-12.) In contrast, the victim testified that the child molestation allegations of Count 2 occurred earlier in the evening when Petitioner was driving him back from the store. (*Id.* at 98.) While in the van, Petitioner touched the victim's testicles with his hand underneath his clothing. (*Id.* at 98-100.) Because the factual basis of each charge is distinct there is no basis for Petitioner's allegation that Count 2 was a lesser included offense of Count 1.

Because Claim 3 is without merit, Petitioner was not prejudiced by counsel not raising this claim on appeal. Therefore, the claim is procedurally defaulted and subject to dismissal on that ground. Alternatively, regardless of exhaustion it is meritless and may be dismissed on that basis. *See* 28 U.S.C. § 2254(b)(2).

Claim 4

In Claim 4, Petitioner argues that his right to due process was violated by the allegations set forth in Claims 1 through 3. In this Order the Court assesses the merits of Claims 1 through 3. The Court determined that Petitioner is not entitled to relief based on the record and the allegations in his Petition. Thus, a claim of cumulative error based on the these claims would fail and Petitioner was not prejudiced by appellate counsel not raising this

claim. Claim 4 is procedurally defaulted and subject to dismissal on that ground. Alternatively, regardless of exhaustion it is meritless and may be dismissed on that basis. *See* 28 U.S.C. § 2254(b)(2).

Conclusion

Petitioner fails to demonstrate prejudice arising from the default of Claims 1(a), 1(b)(i), 1(c)(i) and (ii), 3 or 4. Therefore, they are procedurally defaulted and subject to dismissal. Alternatively, these claims are meritless and may be dismissed on that basis.

Miscarriage of Justice

Petitioner did not allege in the Petition that there will be a miscarriage of justice if his defaulted claims are not addressed on the merits, and he did not file a reply brief where he would have been more likely to raise such an argument. To demonstrate a fundamental miscarriage of justice based on factual innocence, a petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). To establish the requisite probability, the petitioner must demonstrate with new reliable evidence that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 324, 327. Nowhere in the Petition has Valdez presented new evidence or argued that he is actually innocent. Therefore, there are no grounds on which the Court could find a miscarriage of justice.

MERITS

Legal Standard for Relief Under the AEDPA

The AEDPA established a "substantially higher threshold for habeas relief" with the "acknowledged purpose of 'reducing delays in the execution of state and federal criminal sentences.'" *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA's "'highly deferential standard for evaluating state-court rulings' . . . demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

Under the AEDPA, a petitioner is not entitled to habeas relief on any claim "adjudicated on the merits" by the state court unless that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The relevant state court decision is the last reasoned state decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664 (9th Cir. 2005).

"The threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law consists of the holdings of the Supreme Court at the time the petitioner's state court conviction became final. *Williams*, 529 U.S. at 365; *see Carey v. Musladin*, 549 U.S. 70, 74 (2006).

The Supreme Court has provided guidance in applying each prong of § 2254(d)(1). The Court has explained that a state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Williams*, 529 U.S. at 405-06; *see Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). In characterizing the claims subject to analysis under the "contrary to" prong, the Court has observed that "a run-of-the-mill state-court decision applying the correct legal rule to the facts of the prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to'

clause." *Williams*, 529 U.S. at 406; *see Lambert v. Blodgett*, 393 F.3d 943, 974 (9th Cir. 2004).

Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. For a federal court to find a state court's application of Supreme Court precedent "unreasonable," the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." *Id.* at 409; *Landrigan*, 550 U.S. at 473; *Visciotti*, 537 U.S. at 25.

Claim 1(b)(ii)

Claim 1(b)(ii) alleges that appellate counsel provided ineffective assistance by failing to research and raise the issue that Petitioner did not receive sufficient notice of the charge against him, specifically, that he was convicted of sexual conduct with a minor 12 or under (not a minor under 15 as charged in the indictment).

Valdez had a Sixth Amendment right to effective assistance of appellate counsel. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985). To establish IAC, Petitioner must show that his counsel's performance was deficient and that the deficient performance caused him prejudice. *Strickland*, 466 U.S. at 687. To establish prejudice, a petitioner must show that there is a "reasonable probability" that, absent counsel's errors, the result of the appeal would have been different. *Id.* at 694. Thus, the Court assesses whether, if Claim 1(b)(ii) had been raised on appeal, there is a reasonable probability it would have been successful.

As thoroughly addressed above when discussing the default of Claims 1(a) and 1(b)(i), Petitioner received notice well before trial that the State would be presenting evidence that he committed sexual conduct with a minor 12 or under. Therefore, counsel was not ineffective for challenging lack of notice on appeal and Petitioner was not prejudiced by the omission. Claim 1(b)(ii) is without merit.

Claim 2

Petitioner alleges that his sentence on Count 1 constitutes cruel and unusual punishment in violation of the Eighth Amendment.[4] Petitioner was sentenced to 35 years to life on Count 1, sexual conduct with a minor under 15, which was noticed as a dangerous crime against children involving a minor twelve or under. The Arizona Court of Appeals denied this claim finding that the sentence did not violate the Eighth Amendment because it was not grossly disproportionate to the crime. (Doc. 13, Ex. M at 8-12.) The appellate court found several facts particular to the circumstances of the crime in Count 1:

> Valdez was sentenced to a mandatory life sentence for performing oral sex on an eleven-year-old boy . . . . In committing these crimes, Valdez violated L.'s trust and the trust of L.'s family and engaged in extraordinary premeditated, predatory, and manipulative behavior that exploited the boy's youthful naivete. The ultimate act for which Valdez was sentenced to life imprisonment was protracted – oral sex with L. for seven to ten minutes – and involved securing the victim's assistance by having the boy act as a lookout during the sex act.

(*Id.* at 4.)

Petitioner argues that his sentence violates the Eighth Amendment because it was mandated by statute and is disproportionate to the crime. Petitioner is not entitled to relief on either portion of this claim. First, the Supreme Court has concluded that individualized sentencing is not constitutionally required in non-capital cases, rejecting the argument that a sentence (other than death) is cruel and unusual solely because it is mandatory. *Harmelin v. Michigan*, 501 U.S. 957, 994-95 (1991).

Second, the Arizona Court of Appeals' rejection of Petitioner's proportionality claim was not objectively unreasonable. The Supreme Court's jurisprudence in the area of proportionality is somewhat opaque, but it is clearly established that a sentence that is grossly disproportionate to the crime for which it is imposed violates the Eighth Amendment.

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[4] Within this claim Petitioner again mentions the alleged lack of notice as to the charge for Count 1, which the Court has addressed and found meritless in its discussion of Claim 1(b). In their Answer, Respondents address not only Count 1 but also Petitioner's sentences on Counts 2 and 3. Because Petitioner challenged only his sentence on Count 1 in his federal petition, the Court limits its discussion to that count.

Lockyer v. Andrade, 538 U.S. 63, 72 (2003). Although the Court has not clearly defined the parameters of this principle, it will be met only in the extraordinary case. *Id.* at 73, 77. The Arizona appellate court cited the clearly established law from the Supreme Court, setting forth the grossly disproportionate standard, and nothing in their opinion is contrary to the governing law. (Doc. 13, Ex. M at 8-12.)

Next, the Court assesses whether the state court opinion was an unreasonable application of the clearly established law. *See Andrade*, 538 U.S. at 71. "[T]he governing legal principle gives legislatures broad discretion to fashion a sentence that fits within the scope of the proportionality principle - the 'precise contours' of which 'are unclear.'" *Id.* (quoting *Harmelin*, 501 U.S. at 998). The first step in an Eighth Amendment challenge is to make a "threshold comparison of the crime committed and the sentence imposed." *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

Valdez's 35 year to life sentence is not grossly disproportionate to the gravity of his offense – preying upon an 11-year-old child in order to engage in extended oral sexual contact him. The Supreme Court has found no gross disparity for less serious crimes with lengthy sentences: life imprisonment with the possibility of parole for third felony of obtaining $120.75 by false pretenses (priors for a $28.36 forged check and $80 of credit card fraud), *Rummel v. Estelle*, 445 U.S. 263 (1980); 40 years for possession of nine ounces of marijuana and drug paraphernalia, *Hutto v. Davis*, 454 U.S. 370 (1983); life imprisonment without possibility of parole for possession of 672 grams of cocaine, *Harmelin*, 501 U.S. 957; 25 years to life for third felony, grand theft of approximately $1200 (priors for three burglaries and one robbery), *Ewing v. California*, 538 U.S. 11 (2003); and consecutive sentences of 25 years to life for two petty thefts under $100 each, treated as felonies due to prior conviction (recidivist priors for three burglaries), *Andrade*, 538 U.S. 63. The Supreme Court has found an Eighth Amendment violation based on proportionality in two instances: 15 years imprisonment, chained at the ankle and wrist, hard and painful labor, and restriction on civil rights for life, for falsifying a document, *Weems v. United States*, 217 U.S. 349

(1910); and a life sentence without possibility of parole for a "no account" check for $100 (with six priors for nonviolent minor felonies), *Solem v. Helm*, 463 U.S. 277 (1983).

Comparison of Valdez's crime and sentence with these cases undermines his argument. The only cases the Supreme Court found to be grossly disproportionate involved life without possibility of parole for a minor non-violent crime, *Solem*, and a sentence that went beyond imprisonment to include painful labor and lifelong impairment of rights for a minor offense, *Weems*. Petitioner's sentence is not comparable to those circumstances. Further, the Court upheld a sentence of life without parole for possession of a large volume of cocaine because, in part, it threatened serious harm to society. *Harmelin*, 501 U.S. 1002 (Kennedy, J., concurring). Valdez's crime in this case is as serious or worse than the crime committed in *Harmelin*. *See United States v. Farley*, 607 F.3d 1294, 1344-45 (11th Cir. 2010) (upholding a mandatory minimum 30 year sentence for crossing a state line with intent to engage in a sexual act with an eleven-year-old (the act was not completed) and finding the crime "as bad or worse" than Harmelin's drug crime). The Supreme Court has acknowledged that States have a compelling interest in safeguarding minors' well being and that the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 757 (1982) (addressing regulation of child pornography). Further, courts have noted repeatedly the severity of crimes involving sexual abuse of children and the extensive harm they cause. *See Farley*, 607 F.3d at 1345 (collecting cases). In light of the severity of the crime and the fact that Petitioner's sentence allows for parole, his sentence is not grossly disproportionate to the crime he committed. At a minimum, Valdez's case is not the extraordinary case that violates the Eighth Amendment and the state court's rejection of this claim was not an objectively unreasonable application of clearly established federal law. *See Andrade*, 538 U.S. at 77.

CONCLUSION & RECOMMENDATION

Claims 1(a), 1(b)(i), 1(c)(i) and (ii), 3 and 4 are procedurally defaulted and should be dismissed on that basis. Alternatively, these claims are without merit. Claims 1(b)(ii) and 2 do not warrant relief under the AEDPA and should be dismissed on the merits. Based on the

foregoing, the Magistrate Judge recommends the District Court enter an order DISMISSING the Petition for Writ of Habeas Corpus (Doc. 1).

Pursuant to Federal Rule of Civil Procedure 72(b)(2), any party may serve and file written objections within fourteen days of being served with a copy of the Report and Recommendation. A party may respond to the other party's objections within fourteen days. No reply brief shall be filed on objections unless leave is granted by the district court. If objections are not timely filed, they may be deemed waived. Any objections filed should be captioned with the following case number: **CV-11-681-TUC-FRZ**.

DATED this 28th day of March, 2013.

D. Thomas Ferraro
United States Magistrate Judge